



Presentation to
Swan Chamber Of Commerce

“The ACCC & Small Business”

By

John Martin
Commissioner
Australian Competition & Consumer Commission

27th October 2005
Perth

1. INTRODUCTION

In my role as ACCC Commissioner responsible for Small Business matters I am delighted to have the opportunity to speak to small business representatives in Western Australia

The basic philosophy of the ACCC is that we would much rather have businesses understand and comply with the Trade Practices Act, than have to take action to try to rectify a breach.

That's why I'm always happy to accept invitations like this to help inform business, and especially small business, of their rights and responsibilities.

Our Chairman Graeme Samuel has now been in the job for over 2 years and it's been fascinating to watch the way perceptions of Graeme have changed.

Initially, there were accusations that Graeme would have a "big business" bias at the expense of consumers. Subsequently, after he demonstrated strong pro consumer credentials, it was suggested that a bias in the consumer direction might be at the expense of small business interests.

With the ACCC clearly supporting new measures to assist small business to level up the playing field through collective negotiations and strengthening of the abuse of market power and unconscionable conduct provisions some in big business are suggesting the balance has tipped too much in favour of small business.

The fact is that the ACCC will always act on our legal obligations to enforce the Act to ensure that there is a dynamic competitive marketplace and fair trading.

Today I would like to cover a number of issues that should be of interest to you in your small business operations, including:

- the broad role of the ACCC in protecting competition and fair dealing including the interests of competitive small business
- some of the topical issues of further reforms of trade practices relevant to small business including all-inclusive pricing, collective bargaining, unconscionable conduct, unfair contracts and abuse of market power
- scams, spam and other 'new' challenges faced by businesses of all size in the Digital Age

2. IMPACT OF COMPETITION LAW ON SMALL BUSINESS

The broad objective of the Trade Practices Act is to enhance the welfare of all Australians through the promotion of competition and fair trading, as well as to provide for consumer protection.

This is often misunderstood as being about protecting certain businesses or sectors of the economy. Competition policy is about enhancing competition for the benefit of the

nation as a whole, not preserving specific competitors or protecting certain sectors from competition for the benefit of that particular business or industry.

A strong Trade Practices Act promotes a well-functioning market. It promotes confidence in consumers that they are dealing with a business or industry that adheres to high standards, and it inhibits unethical practices by competitors – preventing them from gaining an advantage by using unfair tactics.

Small business is a critical part of a well functioning market. It contributes almost one-third of our Gross Domestic Product and employs over half of the workforce. Small business is integral to vigorous competition and the interests of competitive small business are consistent with those of consumers.

Businesses that will thrive are those able and motivated to take advantage of the competitive environment through innovation, improved efficiencies, keen pricing, quality service standards and other forms of vigorous competition. Small business is often able to respond to the competitive environment more quickly and with more flexibility than many of its larger competitors.

Small businesses can be vulnerable to anti competitive, misleading or unconscionable conduct and the TPA provides important safeguards against this. However the TPA and the ACCC are not panaceas and cannot artificially protect businesses unable to meet the challenge of hard but fair competition.

The difficult task for governments and competition policy regulators is to strike the balance – to distinguish between vigorous but lawful conduct that is likely to lead to significant benefits for consumers and unlawful anti-competitive behaviour that is likely to disadvantage consumers.

3. HOW THE ACCC OPERATES

What it is

The Australian Competition and Consumer Commission is an independent agency that administers the Trade Practices Act without fear or favour, for the benefits of consumers of all kinds throughout Australia not just household consumers but businesses consuming from or supplying to other businesses.

The Commission, through its Regional Offices in each State and Territory ensures that it is close to where the real trade and commerce is taking place. All business at all levels of the supply chain – whether they be producers, wholesalers, distributors or retailers – have an interest in being supplied competitively and efficiently at reasonable prices; and where business are selling goods, their interest is to sell to buyers who have to compete for their product.

The Small Business, Rural & Regional Programs were specifically introduced to ensure that people and small business in all areas have access to information and education about their rights and obligations under the TPA. The ACCC has Regional Outreach Managers located in every regional office and a large part of their time is

spent travelling to regional areas to inform and educate those communities about the ACCC and the Trade Practices Act.

What it covers

The Act and its implementation by the Commission places certain obligations on business, but offers considerable benefits in return.

It offers businesses protection from:

- Restrictive Trade Practices (eg. Price fixing, market sharing, boycotts and acquisitions involving a substantial lessening of competition)
- Misleading or Deceptive Conduct
- Unconscionable Conduct

The obligation we demand in return is that business not engage in any of those acts.

Any business big or small subject to illegal behaviour by its competitors, suppliers or business customers can expect the full support of the ACCC. Any business big or small engaging in such behaviour can expect the full force of the ACCC to be brought down upon them.

In addition, the Act also provides a role for the Commission in:

- Authorising arrangements that may have anti-competitive elements, but which are outweighed by public benefit; and
- Regulating competitive pricing and access in public utility sectors such as gas, electricity, airports, rail and telecommunications.

How it works

In the administration of the Act, the Commission has a dual role as:

- A national enforcement agency, and;
- A provider of education and information for business and consumers to promote compliance with the Act.

The Commission has strong investigative and evidence gathering powers but to enforce its concerns about an alleged breach of the law has to take the matter before the Federal Court. We do, however, have the power to accept Court enforceable undertakings which is a far speedier and less costly route to stopping misconduct, securing admissions and, where appropriate, getting compensation for victims or some other form of remedy.

While it is the enforcement role that gains most publicity, it is the information and support role, especially to small business, that actually takes up the bulk of our work.

In the last financial year we sent out more than 500,000 copies of publications, and added 85 new publications explaining parts of the Act or how to comply.

Over that same period the Commission received 57,308 complaints and inquiries.

This broke down to just on 200 matters being sent for serious investigation 30 new matters ending up in court and the Commission accepting Court enforceable undertakings in 55 other matters.

Some investigations are dropped where the facts do not justify proceeding or where there is a lack of evidence. Some matters may result in administrative settlements.

4. CURRENT SMALL BUSINESS ISSUES

Following various reviews, the Federal Government is moving to make some amendment to TPA provisions affecting the competitive environment for small business in respect of abuse of market power, unconscionable conduct and collective bargaining. In addition the government has announced it will amend the law to require an all-inclusive price in representation of prices when businesses are advertising goods or services.

I briefly outline each of these developments.

Misuse of Market Power

There has been a lot of discussion about how the misuse of market power provisions of the TPA protects small business.

Following some recent High Court decisions the ACCC has expressed the view that there is a need to clarify the interpretation of the section to bring it back to what was intended by Parliament when it was first enacted and then subsequently amended in 1986.

Effective misuse of market power provisions are an important part of any competition law. They deal with situations where a firm has substantial market power and uses that power to damage its competitors or to prevent new firms from competing with it. These provisions are an important adjunct to the other main pillars of an effective competition law – the restrictions on the accumulation of market power through mergers and acquisitions and anti-competitive agreements between competitors.

Effective misuse of market power provisions are important to small business because smaller businesses could be the potential targets of a misuse of market power by a larger business. In this situation the ACCC will act to protect the small businesses involved. We do this not to protect a particular business merely because it is a small business, but to protect competition where small businesses are being targeted for anti-competitive reasons by a more powerful firm.

Small business needs to be careful, however, not to place undue reliance on the misuse of market power provisions.

Firstly, it is not enough to point to the fact that competitors, even small competitors, are being damaged by the actions of a larger, more powerful business. Normal, even aggressive competition is not on its own a misuse of market power. The conduct of the larger business needs to be targeted or intended to damage particular competitors.

This is where the ACCC requires the assistance of small business. The ACCC will investigate properly alleged instances of abuse of market power and use its statutory powers to do so if necessary. However, it needs small business to draw to its attention instances of market behaviour by larger businesses which is both targeted at a particular business and is detrimental or potentially detrimental in its impact.

The second reason why small business should not place undue reliance on the misuse of market power provisions is that they are concerned with a particular form of market conduct - that is, so called horizontal behaviour. This is where a business with substantial market power is seeking to damage one or more of its competitors.

The abuse of market power provisions are not relevant in so called vertical behaviour - that is, where a small business is a customer of, or supplier to, a larger more powerful business. There are other provisions in the TPA which are relevant to these situations to which I will now turn.

In 2004 a Senate inquiry into the effectiveness of the TPA to protect small business examined a range of issues including s46, unconscionable conduct and proposals to improve access of small business to collective bargaining. The Government has indicated its intention to make some changes to s46 but did not accept recommendations made by in the majority report of the Senate Committee.

Unconscionable Conduct

The ACCC has put significant effort into tackling unconscionable conduct against both consumers and small business.

It's important to distinguish between unconscionable conduct – which is illegal, and conduct which simply represents hard bargaining which is legal.

For conduct to be regarded as unconscionable, courts have found that given there is an imbalance of power serious misconduct or some action clearly unreasonable, bullying or thuggish by the larger party must be demonstrated.

Conduct found by the courts to be unconscionable includes:

- blatant disregard of industry codes of conduct or other law
- placing unreasonable conditions on a franchisee
- threatening to withhold essential franchising supplies or placing unreasonable conditions on supply of essential franchising goods to franchisees
- attempting to terminate a commercial agreement for contrived reasons
- failing to honour important terms of a retail lease
- failing to adequately disclose key changes to a contract
- granting an 'exclusive' dealership to one business, while at the same time negotiating with another business
- unreasonably refusing to supply a business
- conduct that is unfair, unreasonable, harsh or oppressive, intimidating, bullying or thuggish, or wanting in good faith

- terminating a contract in a capricious and unreasonable manner

A Senate Inquiry into small business and the TPA reviewed the effectiveness of the unconscionable conduct provisions of the TPA

Whilst the unconscionable conduct provisions were found to have had a positive effect some shortcomings were identified. As a result of that inquiry the government subsequently signalled its intention to introduce a number of reforms. These include an outlawing of the inappropriate use of unilateral variation clauses in contracts and extended coverage in terms of small business size and confirmed proposal that will improve access to collective bargaining.

Collective bargaining

Normally, where groups of competing businesses come together to collectively negotiate terms and conditions and, in particular, prices, this is likely to raise concerns under the TPA. However, the ACCC is able to grant immunity through an 'authorisation' process, but only where we are satisfied that this is in the public interest. This assessment is made on a case by case basis.

Generally, in relation to small businesses collectively bargaining with a larger business, the ACCC finds these arrangements to be in the public interest and allows them to proceed. In recent years, ACCC authorisation has enabled collective bargaining by chicken growers, dairy farmers, sugar cane growers, lorry owner-drivers, TAB agents, hotels, newsagents and small private hospitals amongst others.

The Commonwealth Government has decided to make this process easier for small business by introducing a notification system for collective negotiations with tight time constraints, minimal cost and provision for collective boycott arrangements.

By lodging a notification allowed under the new legislation, the onus of proof is reversed. Small business will, after 14 days, be afforded the same immunity from the TPA to collectively bargain, unless, and until, the ACCC is satisfied that it is not in the public interest.

It will thus be up to the ACCC to demonstrate that immunity is not justified, rather than, as is currently the case, on the applicants to demonstrate that it is.

The key features of the new process include:

- Immunity will only be available to collective bargaining arrangements in the public interest
- Validity will be determined by whether a collective bargaining notification form has been completed correctly and is accompanied by the correct lodgement fee (a decision is yet to be made on the cost but it is likely to be \$1000 per notification)
- Collective bargaining notifications must be target specific and specific to a particular bargaining group. Targets are not required to engage in collective bargaining arrangements
- A three year time limit, and

- A \$3 million financial limit

The ACCC will be working closely with the Office of Small Business in providing guidance to small businesses throughout Australia in understanding and applying for the new notification arrangements.

All Inclusive Pricing

When advertising or making any form of representations on behalf of a business, care must be taken not to deliberately or inadvertently mislead about the value, quality, or place of origin of a product, or its impact on the environment or full price.

The ACCC has worked closely with small business to assist avoiding problems in these areas- however some businesses can't resist the temptation to gain an unfair advantage over competitors and "short change" consumers at the same time.

One difficult area has been full price advertising, particularly in industries like airline travel and travel packages and auto retailing.

The ACCC has favoured the full price being shown in any advertisements but court decisions had indicated that split price representations were permissible provided they were not complex for consumers to work out the full price.

The Federal Government has now announced it will legislate to require all business to provide a full price figure in any representation. Any small business especially service providers that have slipped into the habit of representing or quoting product prices to consumers excluding some element of the cost – such as GST – are on notice that the ACCC is likely to take action against them.

5. SCAMS AND SPAM

It is an unfortunate aspect of business that there are those who choose to operate outside the law; attempting to gain an advantage over honest traders through unfair tactics, deception and even fraud. With businesses increasingly relying on technology, many of the old scams and swindles have been updated, with small business one of the main targets for such operators.

They rely on the assumption that business operators, particularly in small business, are very busy, and will give them the information they ask for without thinking about it.

While there are a vast range of scams targeted at traders, they generally fall into one broad category known as inertia selling, fake billing and fraudulent invoicing

Inertia Selling, Fake Billing and Fraudulent Invoicing

Fake billing generally involves offering advertising, usually in magazines, professional journals or 'business directories', for which the perpetrator of the scam seeks payment for unsolicited goods or services. Unscrupulous operators may try to place businesses in a position where they will inadvertently pay for goods or services which they never requested – and often don't exist.

One of the most widespread methods is to 'sell' a company an entry in a (perhaps non-existent) business directory by:

- getting the 'authorisation' of a junior member of staff; or
- sending an invoice along with a copy of the entry;

The person running this scheme hopes that payment will occur in the normal course of business and the fact that no goods or services are delivered will go unnoticed. Specific provisions are in the Act to stop business directory schemes.

Another common form of this scam occurs where operators send out phoney bills claiming to be from a legitimate organisation - from your bank, credit card company or some other service that you use.

These operators will bill you for things you normally purchase, and for which you receive invoices. The catch is, the scammers did not supply you with the goods and services. They rely on flaws in your accounting, authorisation and payment procedures to lead you into making an unnecessary payment in their favour. Some even pretend to work for charitable organisations.

The operators of the scam are depending on the fact that some of their 'targets' may ultimately find it easier to pay than to assert their legal rights, or may be tricked into believing that they genuinely owe payment for the good.

Internet domain name scammers have taken this type of billing one step further. Relying on a lack of understanding on how the domain name system works these scammers send out letters giving all the appearance of an invoice with a very prominent "due by" date to add to the sense of urgency with regards to payment. In the letter the business may be offered the opportunity to register a new domain name that is similar to the current one for example mybusiness.com instead of the current mybusiness.com.au. The difference is not noticed or understood and the invoice is paid. Often the business does not realise what has happened until an invoice is received from the original registrar.

Domain Names Australia

In October 2003 the ACCC commenced proceedings against Domain Names Australia Pty Ltd and its director, alleging that the company had breached the Act by sending out misleading or deceptive notices inviting the recipient to register a particular internet domain name.

The Federal Court found that the form of notice conveyed a number of false representations namely that the registration of the recipient's existing domain name had expired or would expire if payment was not made by the 'Return Date', that Domain Names Australia Pty Ltd was offering to re-register or renew the recipient's existing domain name and that the recipient would be required to pay the amount mentioned in the notice to maintain the registration of his existing domain name.

The court stated that "many [persons] who receive the notice will know very little about the internet and the use and registration of domain names. These recipients will

include first time users of the internet and unsophisticated Registrants of domain names".

It was further observed that in circumstances where the recipient of the notice was a large organisation equipped with an accounts department or the like "there is a greater risk that the reader [the person in the accounts department] will have little or no knowledge about the Internet, the registration of domain names, or the fact that it is possible to obtain registration of very similar domain names".

Avoiding Billing Scams

Businesses should always ask questions and double check their records, especially if you've never heard of the publication, or if they tell you that you've advertised with them before. Keep details of any domain name registrations handy.

SPAM

The internet is an important communications tool for businesses, allowing swift, cost-effective communication locally, nationally and across the globe. However, the increasing reliance of business on email communications presents new challenges, and new risks.

Unsolicited commercial email delivered in bulk is often referred to as spam. The volume resulting from such emails can have serious effects on business owners and operators; leading to increased costs and hampering the ability of the business to communicate with its clients, customers and suppliers.

Currently spam accounts for over 60% of all email. These include ads for get-rich-quick schemes, adult web sites and products, software and miracle cures.

Spam is more than just an annoyance. It is used to advertise scams and opens up computers to viruses, worms, trojans and spyware.

One of the best known email scams doing the inbox rounds recently has been the phishing emails (that's with a ph). These emails give the appearance of being an official notification from a bank or similar financial institution. They appear genuine and have hooked a number of victims. Mostly they ask the recipient to enter banking details thus leaving the victim's bank account vulnerable. However, some of the links download spyware that can log keystrokes and internet use.

A more recent variation on email spam is SMS spam. Text messages selling products, announcing a competition win and advertising events and websites are being sent to random mobile phone numbers. This type of spam is becoming more prolific and given the features of new phones such as being able to send photos and direct linking to the internet there is the growing danger of viruses via SMS spam. Given the smaller capacity of the SMS inbox these intrusions can also become a serious inconvenience for the user.

Text messages can be used to distribute scams. A common one being that a message is received from an admirer, an anonymous friend and so on. The message includes a contact number. This turns out to be a premium number and the result is no catch up call with a prospective date just a hefty phone bill.

How can I avoid being a victim of spam?

Delete all spam including SMS spam. Do not be tempted to follow links, download attachments, call the phone numbers or take a peek at what is on show.

This is equally true for ‘unsubscribe’ links in emails from unknown sources, which usually only serve to verify your address to the spammer, making you an even more attractive target.

Install computer security software including virus protection, firewalls and spam filters and keep it all up to date. Simple virus protection is not enough on its own. You may need to ask a computer professional or discuss filters with your internet service or phone provider.

Remember back up your data that way if something goes wrong you will still have a copy of all your computer files.

Australia’s anti-spam law – the Spam Act 2003

Under the new Australian Spam Act 2003 which came into effect on 10 April 2004, it is illegal to send, or cause to be sent, ‘unsolicited commercial electronic messages’ that have an Australian link. A message has an ‘Australian link’ if it either originates or was commissioned in Australia, or originates overseas but has been sent to an address accessed in Australia.

The Spam Act covers all electronic messages – not just emails, but mobile phone text messages (SMS), multimedia messaging (MMS) and instant messaging (iM) – of a commercial nature. However, the Act does not cover voice or fax telemarketing. The legislation sets out penalties of up to \$1.1 million a day for repeat corporate offenders.

Complaints regarding particular spam can be made to the Australian Communications Authority.

How can I avoid sending spam?

To comply with Australia’s spam laws, any commercial electronic message must meet a number of conditions. Any message sent by an Australian business that doesn’t meet all three of these conditions is defined as spam:

- Consent – it must be sent with the recipient’s consent. They may give express consent, or consent may be inferred from their conduct and ‘existing business or other relationships’
- Identity – it must contain accurate information about the person or organisation that authorised the sending of the message
- Unsubscribe – it must contain a functional ‘unsubscribe’ facility to allow the recipient to opt out from receiving messages from that source in the future

A spam message is not necessarily sent out in ‘bulk’ to numerous addresses – under Australian law, a single electronic message can also be considered spam.

It’s therefore important that if you have existing databases of customers, or are in the habit of simply adding anyone who purchases from you to your database, you now

seek their permission to send them emails or text messages, or you run the risk of breaching this legislation.

Don't become an 'accidental spammer'

If your business doesn't have effective security measures in place, spammers can infect your computer with a virus and use it to send spam to other people without your knowledge. To avoid becoming an accidental spammer, learn about and adopt these good security practices:

- Use anti-virus software and firewall software, and ensure it is updated regularly
- Download and install the latest security patches for your computer system
- Attachments to email messages can be dangerous. Only open them if you know what they contain and who has sent them to you. Otherwise, it's safest to delete them immediately. If you do need to open an attachment, run it through up-to-date anti-virus software first; and
- Use long and random passwords

6. CONCLUSION

We understand the difficulty for small business in dealing with all the issues involved in trade practices law, let alone all the regulatory compliance which has to be dealt with. However, it is part of good business management that small businesses embrace and utilise the protections and obligations of the Trade Practices Act.

Ultimately, the ACCC's main priority will continue to be compliance with the TPA - achieved through strong enforcement, "user friendly" education and encouraging better business practices which avoid competition problems.

Thank you for the opportunity to speak to you – I now look forward to responding to questions and comments from your small business experiences.